Supreme Court, U.S.
FILED
94 1861 MAY 12 1995

NO._____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

GILBERT MARTINEZ MUSQUIZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

Petition for Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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45 pp

QUESTION PRESENTED

When proof of a defendant's silence after arrest is offered against him, does it make any difference whether the silence came before or after *Miranda* warnings

(1) as a matter of Constitutional protection; or
(2) as an exercise of the Court's supervisory power; or
(3) as a constituent of the Rule 403, F.R.E., balancing matrix?

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For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Gilbert Martinez Musquiz, praying that Writ of Certiorari be issued to review the judgment and opinion in the United States Court of Appeals for the Fifth Circuit issued on February 10, 1995, files this Petition for Writ of Certiorari, saying more particularly in support:

OPINIONS AND JUDGMENTS ISSUED IN THE COURTS BELOW

On February 10, 1995, the United States Court of Appeals for the Fifth Circuit rendered its opinion affirming the judgment and conviction in the case styled *United States of America vs. Gilbert Martinez Musquiz*, No. 93-2600. A copy of that opinion is attached hereto as Appendix A. A copy of the Judgment and Sentence of the District Court is attached hereto as Appendix B.

JURISDICTION

The judgment of the court below (Appendix A, infra) was entered on February 10, 1995. Petitioner timely filed a Petition for Rehearing *En Banc*. The court below entered an order denying the petition on March 16, 1995. A copy of that order denying rehearing *en banc* is attached hereto as Appendix C. This petition is filed within ninety (90) days of the original February 10, 1995 judgment. The jurisdiction of this Court to review the judgment on petition for certiorari rests upon Sec. 1254(1) of the Judicial Code and Supreme Court Rule 10.1.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves a direct conflict between various federal court decisions in the interpretation and application of the Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; *nor shall be compelled in any criminal case to be a witness against himself*, not be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation. (Emphasis supplied).

STATEMENT OF THE CASE

On October 5, 1992, Robert Martinez Gatewood, Steven Joseph Garza and Gilbert Martinez Musquiz were named in a five-count Indictment, Criminal Case No. H-92-238, which was filed in the United States District Court, Southern District of Texas, Houston Division, Honorable Ewing Werlein, presiding.

Count One of the Indictment alleged that Musquiz conspired with Gatewood and Garza to possess with intent to distribute in excess of five (5) kilograms of cocaine in violation of 21 U.S.C. Sections 841(a)(1); 841(b)(1)(A) and 846. Count Two charged that all three, on or about September 25, 1991, attempted to possess, with intent to distribute, in excess of five (5) kilograms of cocaine in violation of 21 U.S.C. Sections 841(a)(1); 841(b)(1)(A); 846 and 18 U.S.C. Section 2. The third count charged that all three attempted to possess with intent to distribute in excess of five (5) kilograms of cocaine on or about October 9, 1991 in violation of 21 U.S.C. Sections 841(a)(1); 841(b)(1)(A); 846 and 18 U.S.C. Section 2. Count Four charged Gatewood with use of a communication facility in committing a felony under the Controlled Substances Act in violation of 21 U.S.C. Section 843(b). Similarly, Count Five charged Garza with use of a communication facility in committing a felony under the Controlled Substances Act in violation of 21 U.S.C. Section 843(b). Following a 13-day jury trial, Musquiz was found guilty on Count One, but acquitted on the two attempt counts. Punishment was assessed at 168 months imprisonment for Musquiz. Notice of Appeal was timely filed by Musquiz to the Fifth Circuit Court of Appeals.

On February 10, 1995, a panel of the Fifth Circuit Court of Appeals affirmed the Appellants' conviction in an opinion authored by Judge Higginbotham and joined by Chief Judge Politz and Judge DeMoss. The panel held that it was within the discretion of the trial court to allow cross-examination by the prosecution on Musquiz' silence upon arrest and prior to a *Miranda* warning. A Petition for Rehearing *En Banc* was denied on March 16, 1995.

STATEMENT OF FACTS

Gilbert Martinez Musquiz appealed his criminal conviction on conspiracy charges, urging that his conduct was misread -- he was not dealing but trying to collect DEA reward money by turning in drug dealers. The main issue was whether the trial court should have allowed the prosecutor to cross-examine Musquiz about why he failed to offer this explanation and instead remained silent after he was arrested and before receiving *Miranda* warnings.[1] Upon arrest, co-defendant Gatewood (an ex-police officer) made an explanatory statement consistent with his in-Court testimony. Musquiz was neither questioned nor *Mirandized*, and remained silent. Musquiz was acquitted of two "attempt" counts, convicted of conspiracy and sentenced to 168 months.

REASONS FOR GRANTING THE PETITION

1. The Constitutional issue of the admissibility of post-arrest, pre-*Miranda* silence has been expressly left open by the Court since 1975. See, *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 2244, fn. 8 (1976). The issue comes into play with almost every arrest and the Court should address and resolve what amounts to a 20-year-old ambiguity.

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1 See Appendix D.

2. Federal police agents need guidance. Presently, the failure to give *Miranda* warnings may or may not inure to the benefit of the prosecution, *i.e.*, if *Miranda* is not given, then silence of the arrestee may sometimes, in some circuits, be used against him while silence after the warnings is clearly not admissible. Thus, while directed to give the warnings, such agents are encouraged to forego it in practice in order to procure the advantage of an "admissible" silence.

3. There is either a logical, analytical or Constitutional difference between the two varieties of silence after arrest or there is not. The question has matured over 20 years in the various Courts of the nation and, having so matured, should be laid to rest.

QUESTION RESTATED AND ARGUMENT

When proof of a defendant's silence after arrest is offered against him, does it make any difference whether the silence came before or after *Miranda* warnings

(1) as a matter of Constitutional protection; or
(2) as an exercise of the Court's supervisory power; or
(3) as a constituent of the Rule 403, F.R.E., balancing matrix?

(1) As a matter of Constitutional Protection

The argument that there is a Constitutional guarantee which prohibits the Government from using the invocation of a Constitutional right to silence against a citizen who invokes it derives from *Doyle v. Ohio, Id.* As that case points out,

> ...while it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who

> penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.

Doyle at 2245.

But if it is acknowledged that the *Miranda* warnings have become a part of the texture of American culture -- as they have[2] -- then there is no logical vitality in the argument that the rationale for exclusion of silence as evidence under *Doyle* is in the nature of "breach of promise." The furnishing of the *Miranda* warnings do not create the right to remain silent; that right is conferred by the Constitution at birth. Properly considered, the use of custodial silence for impeachment purposes was fundamentally unfair in *Doyle* not because it broke an implied promise by a single narcotics agent, but because it broke a promise made by the United States Constitution. Analytically, the present custodial facts differ from *Doyle* only in that here the defendant *presumptively* knew his Constitutional rights, whereas in *Doyle* the presumption became a certainty because they were recited. When the Government argues that reading of *Miranda* warnings is a magic moment, it both denegrates the notion of an informed citizenry and unduly tempts Government agents to avoid reading the warnings in the knowledge that silence in the face of arrest can be used at

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2 *Miranda* warnings are broadly understood by every citizen who has ever seen a "Dirty Harry" movie or watched a police procedural television show.

trial where no warnings were given. *See also, Grunewald v. United States*, 353 U.S. 391, 77 S.Ct. 963 (1957).[3]

(This Court's decisions in *Fletcher v. Weir*, 455 U.S. 603, 102 S.Ct. 1309 (1982) and *Brecht v. Abrahamson*, _____ U.S. _____, 113 S.Ct. 1710 (1993) add nothing to the clarification of the question because they are both collateral reviews of state proceedings and may mean no more than that the Court is solidifying a reluctance to disturb state convictions on post-conviction *habeas corpus* review.)

(2) *As an exercise of the Court's supervisory power* and (3) *as a constituent of the Rule 403, F.R.E., balancing matrix.*

Footnote 8 of the majority opinion in *Doyle*, mentioned above, states:

> The dissent by Mr. Justice STEVENS expresses the view that the giving of *Miranda* warnings does not lessen the "probative value of [a defendant's] silence... ." *Post*, at 2246. But, in *United States v. Hale*, 422 U.S. 171, 177, 95 S.Ct. 2133, 2137, 45 L.Ed.2d 99 (1975), we noted that silence at the time of arrest may be inherently ambiguous even apart from the effect of *Miranda* warnings, for in a given case there may be several explanations for the silence that are consistent with the existence of an

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3 In fact, the actual language of *Miranda* is instructive:

> In accord with this decision, it is not permissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation.

Miranda v. Arizona, 384 U.S. 436, 468 n.37, 86 S.Ct. 1602, 1629 n.37 (1966).

> exculpatory explanation. In *Hale we exercised our supervisory powers over federal courts*. The instant cases, unlike *Hale*, come to us from a state court and thus provide no occasion for the exercise of our supervisory powers. Nor is it necessary, in view of our holding above, to express an opinion on the probative value for impeachment purposes of petitioners' silence. We note only that the *Hale* court considered silence at the time of arrest *likely to be ambiguous and thus of dubious probative value*. (Emphasis supplied).

Hale, id., is indeed instructive, and should be controlling on the use of the Court's supervisory power. A close reading of *Hale*, where the Court was using its supervisory power, yields the inescapable result that it holds *any* custodial silence is inherently ambiguous and prohibitively prejudicial. Although at 95 S.Ct. 2137, the Court gives the fact that *Miranda* warnings had been read as an *example* of one of the reasons silence is ambiguous, it does not hold that the recitation is controlling. In *Hale*, the Government argued that since the defendant testified, it was permissible under *Raffel v. United States*, 271 U.S. 494, 46 S.Ct. 566 (1926), to impeach his credibility by showing that he had remained silent at the time of his arrest. The Court did not agree, saying that if the Government fails to establish a threshold inconsistency between the silence of the defendant when arrested and later exculpatory testimony at the trial, proof of silence lacks any significant probative value on the credibility of the defendant and must be excluded, because it carries with it an intolerably prejudicial impact. It is symptomatic of the confusion of this issue that although, on its face, *Hale* seems directly controlling, it is not even cited by the court below. (See Appendix A). Although a direct appeal, not a collateral review, the opinion below seems to turn on *Fletcher*, *supra*, and *Brecht*, *supra*,

this Court will reaffirm *Hale* and provide a "bright line" rule that custody, not *Miranda,* is the touch stone; that any other rule would dilute the thrust and essence of the requisite that warnings must be given at arrest and that any silence after arrest is ambiguous at best.

CONCLUSION

Any distinction between pre-*Miranda* and post-*Miranda* silence is a false dichotomy; there is neither logical nor analytical nor Constitutional sense to be made of such a distinction. If *Miranda* is to be enforced and is indeed still the law of the land, then Government agents need to be warned that they procure no advantage by failing to give the warnings.

For an example of confusion in the Circuit Courts, compare the Fifth Circuit's decisions in *United States v. Impson*, 531 F.2d. 274 (5th Cir. 1976); *United States v. Henderson*, 565 F.2d 900 (5th Cir. 1978); this Court's decision in *United States v. Hale, supra*, with the panel decision contained in the instant case in Appendix A. When the panel below claims that *Henderson* and *Impson* are "...fact bound and case specific..." and fails to even mention *Hale*, it is being disingenuous. One needs only to read those four cases -- *Henderson, Impson, Hale* and the panel decision in the instant case -- to understand the confusion and disarray into which precedent has fallen on the issue before the Court.

See also, *U.S. vs. Negrete-Gonzales*, 966 F.2d 1277 (9th Cir. 1992). *United States v. Canterbury*, 985 F.2d 483 (10th Cir. 1993); *United States v. Baker*, 999 F.2d 412 (9th Cir. 1993).

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-2600

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GILBERT MARTINEZ MUSQUIZ and
ROBERT MARTINEZ GATEWOOD,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas

Before POLITZ, Chief Judge, and HIGGINBOTHAM and DeMOSS, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Robert Martinez Gatewood and Gilbert Martinez Musquiz appeal their criminal convictions on cocaine charges, urging that their conduct was misread--they were not dealing but trying to collect DEA reward money by turning in drug dealers. The main issue now is whether the trial court should have allowed the prosecutor to cross-examine Musquiz about why he failed to offer this explanation and instead remained silent after he was arrested and before receiving Miranda warnings. We hold that the questions were permissible, reject other contentions, and affirm.

I.

In the spring of 1990, Robert Gatewood, a police officer in Houston, asked retired officer James Montero if he would like to make money by stealing from drug dealers. Gatewood told Montero that during a 1988 homicide investigation of some Colombians, he and another officer had found and shared between $200,000 and $300,000. Montero replied that he wanted no part in such a scheme.

The Houston Police Department suspended Gatewood in November 1990. Beginning in January 1991, Gatewood repeatedly asked his friend, Ana Maria Jaramillo, to find out from her imprisoned son the names of Colombian drug dealers. Gatewood explained that he and his confederates could steal drugs and money by posing as police officers, and that the Colombians would be unable to report their losses to the police.

Undercover DEA agents Frank "Mike" McDaniel and Jerry Garner arranged a meeting for September 25, 1991, at which a man named Carlos was to deliver 100 kilograms of cocaine to a man named Pacho. Carlos was a confidential DEA informant. Mario Jaramillo was to supply the cocaine to Carlos, and Ana Maria acted as Mario's agent. McDaniel and Garner told Carlos and Ana Maria about the meeting, and Ana Maria told Gatewood and Mario. Ana Maria did not know where the meeting would be, so she told Gatewood to follow Carlos to the meeting.

On September 25, Carlos and Pacho met at a TGI Friday's restaurant in Houston. Narcotics task force agents were stationed outside. Surveillance agents saw Gatewood follow Carlos to the restaurant and wait outside in his Pontiac Grand Am while watching the restaurant. Gatewood spoke on a cellular phone for a while. Steve Garza, a

former Houston police officer, pulled up in a Chevrolet Caprice next to the Grand Am and spoke with Gatewood. Then Gilbert Musquiz, Gatewood's cousin, walked up to the Grand Am and spoke with Garza and Gatewood. The three men drove around the restaurant for a while and watched it, following Pacho when he drove off in his Mazda.

Later that same day, McDaniel and Garner went to a Holiday Inn to arrange for the drug delivery. They spotted Garza's Chevrolet Caprice at the parking lot and so called off the delivery. McDaniel told Ana Maria that he had spotted the Caprice at the Holiday Inn, whereupon Ana Maria called Gatewood to relay this information. The Caprice then left the lot.

On October 7, McDaniel and Garner introduced Ana Maria to undercover agent Robert Boudreau, who arranged to deliver cocaine to her the next day. On October 8, Ana Maria and another man met Boudreau, and they were arrested. Ana Marie agreed to cooperate with the authorities. On October 9, Ana Maria called Gatewood and told him that some Colombians had bought 114 kilograms of cocaine. She said that they had stashed it their Chevrolet Suburban truck with Mississippi plates in the parking lot of the Adam's Mark Hotel in Houston. Garza and Musquiz soon drove up to the Adam's Mark Hotel in Garza's Caprice, and Gatewood drove up in his Grand Am. Gatewood called Ana Maria from his cellular phone several times, telling her: "We're going to go after it." An undercover agent left the hotel, put a suitcase in the Suburban's trunk, drove to a nearby shopping mall, put the keys inside the truck's gas cap, and entered a nearby restaurant. Garza, Musquiz, and Gatewood followed the Suburban to the mall and watched it. Gatewood repeatedly telephoned Ana Maria, and she told him that the keys had been left in the ashtray in the past. Musquiz got into Gatewood's Grand Am. Gatewood and

Musquiz pulled up alongside the Suburban. Musquiz was wearing a police raid jacket and black leather gloves and carrying a security guard's badge, even though it was a hot day and Musquiz had never been a police officer or security guard. After almost two hours of surveillance, Musquiz got out of the Grand Am and walked around the Suburban, checking the tops of the tires and pulling on door handles. Agents then arrested Gatewood and Musquiz. Garza fled but turned himself in one week later. Officers found a loaded revolver under Gatewood's driver's seat.

A federal jury convicted Garza, Gatewood, and Musquiz of conspiracy to possess cocaine with intent to distribute. Gatewood was also convicted of using a communication facility in the course of committing a drug trafficking offense. All three defendants argued unsuccessfully that they were just trying to collect DEA reward money by turning in narcotics dealers. Gatewood and Musquiz now appeal.

II.

Defense counsel by a motion in limine asked the court to instruct the prosecutor not to question Musquiz about his silence in the interval between arrest and Miranda warnings. The trial judge denied the motion. Musquiz testified on direct examination that he was just trying to earn a reward for turning in drug traffickers. The prosecutor cross-examined Musquiz about his not offering this explanation when he was arrested.

Musquiz relies on *United States v. Henderson*, 565 F.2d 900 (5th Cir. 1978). *Henderson* turned on the balance to be struck between probative value and prejudice under the rules of evidence. Henderson, a prisoner, was silent when searched for marijuana. Miranda warnings came after the

search. After Miranda warnings, Henderson gave his explanation, the same explanation he offered at trial. The court held it was reversible error to attack Henderson's explanation by stressing in closing argument his silence when confronted by officials. *Id.* at 905-06. The panel concluded that the comment was highly prejudicial and lacked significant probative value, since Henderson's silence was consistent with his explanation at trial. *Id.* at 905. Concluding that on these facts the prejudice outweighed the minimal probative value, the panel reversed Henderson's conviction. *Id.* at 905-06; see also *United States v. Impson*, 531 F.2d 274, 277-78 (5th Cir. 1976). *Henderson* and *Impson*, on which it relied, reflect hostility toward prosecutorial use of a defendant's silence. That hostility seems to have flourished against the backdrop of an expansive vision of a defendant's rights under the Fifth Amendment, although the opinions do not offer that explanation. Whatever the source, it found expression both in their balancing of prejudice and probative value and in the absence of deference given the trial court's ruling. Laying aside the correctness of the appellate role they implicitly assume, these decisions yield no ruling or holding binding on later panels of this court. Rather, they are case specific and fact bound. We would be consistent with *Henderson* and *Impson* in our holding today even if the legal matrix in which the balance is to be struck had not changed. It has.

The Supreme Court and other courts of appeals do not, at least now, share the *Henderson* panel's unwillingness to give much, if any, weight to the probative value of a defendant's silence. Indeed, *Henderson* and *Impson* refused to recognize the difference between silence before a Miranda warning and silence after a defendant has been told that he may remain silent and his silence will not be used against him. This worked an extension of Miranda's bite by giving

silence little, if any, probative value and blurring the distinction between silence before and silence after a Miranda warning.

Since *Henderson*, the Supreme Court, using the same framework of probative value and prejudice, has recognized that "[s]uch [post-arrest, pre-Miranda] silence is probative." *Brecht v. Abrahamson*, 113 S.Ct. 1710, 1716 (1993). It has distinguished post-warning silence, holding that a Miranda warning that a suspect need not make a statement makes the use of silence both unfair and unreliable because the warnings "induce silence by implicitly assuring the defendant that his silence [will] not be used against him." *Fletcher v. Weir*, 455 U.S. 603, 605 (1982) (per curiam); accord *Anderson v. Charles*, 447 U.S. 404, 407-08 (1980). Indeed, the Court has found that pre-Miranda silence can be highly probative precisely because it implicates no such assurances. *Fletcher*, 455 U.S. at 607; *Brecht*, 113 S.Ct. at 1716; see also *United States v. Butler*, 924 F.2d 1124, 1129 (D.C. Cir.) (holding post-arrest, pre-Miranda silence admissible in federal trial), *cert. denied*, 502 U.S. 871 (1991); *United States v. Rivera*, 944 F.2d 1563, 1568 (11th Cir. 1991) (same, in case where witness made comments in prosecution's case-in-chief).

We cannot agree then with Musquiz's contention that *Henderson* laid down a prophylactic ban on admission of post-arrest, pre-Miranda silence or that its holding rested on federal supervisory power. The reality is that *Henderson's* weighing came at the high mark of Miranda's reach, a reach later shortened by the developing Miranda doctrine.

On these facts, a reasonable juror may have supposed that Musquiz would have explained when confronted by the police if he was in fact trying to assist the police in catching drug dealers. The district court acted well within its

discretion in allowing the cross-examination. Given the deference due the trial court ruling, we cannot conclude that the probative value of Musquiz's silence was substantially outweighed by the danger of unfair prejudice. We find no error in the admission of this evidence. In doing so we announce no broad rule of evidence. The admission of evidence that a defendant remained silent on arrest and before a Miranda warning turns on fact specific weighing by the trial judge. See Fed. R. Evid. 403.

III.

Gatewood argues that the district court should have excluded his 1990 statements to James Montero about a plan to steal money from drug dealers and his 1988 theft during a homicide investigation. This evidence is relevant to Gatewood's intent, knowledge, plan, and absence of mistake or accident. See Fed. R. Evid. 404(b). It negates his claim that he was only trying to catch drug dealers to earn reward money. Gatewood argues that his actions in 1988 and statements in 1990 are too remote to shed light on his intent in 1991. We cannot say that these events are so remote that the evidence lacks any probative value.

At Musquiz's request, the court gave a limiting instruction that the proof of the 1988 theft was admissible only against Gatewood and then only on the issue of intent. Musquiz argues, however, that the instructions on conspiracy prejudiced him because they stated that conspiracy "is a kind of 'partnership in crime' in which each member becomes the agent of every other member." Thus, he claims, the jury could have used the previous theft against Musquiz by imputing Gatewood's intent to Musquiz. Musquiz moved for severance, but the district court denied the motion.

Defendants who are indicted together should generally be tried together, particularly in conspiracy cases. "[A] district court should grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants . . . ." *Zafiro v. United States*, 113 S.Ct. 933, 938 (1993). We review for abuse of discretion. Here, the district court was well within its discretion in relying on limiting instructions. We presume that jurors follow the law. Evidence of one defendant's past crimes "does not ordinarily justify severance," even though it is inadmissible against a codefendant. *United States v. Rocha*, 916 F.2d 219, 228 (5th Cir. 1990), *cert. denied*, 500 U.S. 934 (1991). The prosecutor did not try to ascribe Gatewood's theft to Musquiz. In light of the explicit limiting instruction, the claimed link between the conspiracy instruction and the spillover guilt is too tenuous to amount to a serious risk of prejudice. There was no abuse of discretion.

IV.

Gatewood asks this court to reverse his convictions because voir dire developed the fact that veniremember number seven had doubts about her ability to be fair and impartial. At the close of voir dire, Gatewood's attorney said that he would challenge this member of the venire for cause, but then said: "Tell you what, we will withdraw the challenge on [number seven]." Gatewood's attorney then made four other for cause challenges, and the judge granted all four. Neither party challenged number seven for cause or peremptorily, and she became the foreperson of the jury.

By withdrawing the challenge, Gatewood waived his objection. Waived errors are entirely unreviewable, unlike forfeited errors, which are reviewable for plain error. *United States v. Calverly*, 37 F.3d 160, 162 (5th Cir. 1994)

(en banc), *petition for cert. filed*, -- U.S.L.W. -- (U.S. January 18, 1995) (No. 94-7792). In any event, the error was not plain because number seven clarified her answers and expressed a willingness to follow the law and instructions.

V.

The district court denied access to FBI records of rewards paid informants during 1990 and 1991. Defendants urge that this lack of access frustrated their right to confront the witnesses against them. Gatewood argues that this refusal impaired his ability to cross-examine Ana Maria regarding her motives for testifying. Musquiz argues that it impeded his defense that his intent in helping Gatewood was to earn a reward.

In the government's case-in-chief, DEA agent McDaniel testified that the DEA often rewarded informants based on the number of defendants, the quantity of drugs seized, and the quality of the case. At the close of the government's case, Musquiz subpoenaed the DEA records. The court quashed the subpoena pending further consideration, persuaded that amounts paid in the past were not relevant but that DEA policy regarding payment of rewards might be relevant. During Musquiz's case, retired DEA agent Paul Herring testified that an informant's tip that led to seizure of 114 kilograms of cocaine would merit a reward of between $10,000 and $20,000. Musquiz renewed his request for records, and the government stated that it was willing to stipulate that rewards had been paid. After reviewing the records in camera, the court denied the motion because the records were irrelevant and uncontradicted testimony had already established the size of DEA rewards. Because the records would have been duplicative and at best tangentially relevant, the district court did not abuse its discretion.

Gatewood argues that he needed the DEA reports to contradict Ana Maria's testimony that she had never been a government informant and to prove her ulterior financial motive for testifying against Gatewood. Before trial, however, the government gave the defense an informant payment sheet showing payments it had made to Ana Maria to reimburse her expenses. McDaniel testified that the DEA had not paid her a reward but had reimbursed her expenses and made monthly subsistence payments to her during the investigation. He also testified that she had not been paid anything for this case, because there had been no expenses, and that she was still on the DEA payroll. DEA agent Boudreau testified that the DEA had paid Ana Maria $67,174.93 for assistance in investigating Colombians, of which $25,957.46 was subsistence payments and the rest expense reimbursements. Boudreau also testified that Ana Maria had received no reward. The district court then denied the request for the underlying documents and reviewed the records in camera, satisfying itself that the defense had not been deprived of any significant information. The prosecutor tendered copies of the DEA forms to the defense, who used these forms in cross-examining Ana Maria. The defense attorneys questioned her at length about DEA payments, the terms of her plea agreement, and her reasons for cooperating with the government. In short, Gatewood had enough information for cross-examination.

VI.

Gatewood makes four challenges to the district court's application of the Sentencing Guidelines. First, he contests the application of a two-point sentencing enhancement for use of a gun during a drug offense under U.S.S.G. § 2D1.1(b)(1). He argues that because the gun was found under the seat of his car, it was not involved in this offense. Application Note 3 to that Guideline states: "The adjustment

should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." The district court's factual finding that the weapon was connected with the offense was not clearly erroneous.

Second, Gatewood argues that the district court should not have enhanced his sentence by two levels for his leadership role in the crime under U.S.S.G. § 3B1.1(c). But it was Gatewood's idea to steal from drug dealers. Gatewood asked Ana Maria to find traffickers. Gatewood recruited Garza and Musquiz. Gatewood made calls to Ana Maria on his cellular phone, finding out the minutiae about the Suburban and its drug contents. Gatewood told Garza and Musquiz to come to the Adam's Mark Hotel, and he directed the surveillance. Gatewood ordered Musquiz to go examine the Suburban. Even though the three men planned to split the proceeds equally, the finding of a leadership role was not clearly erroneous.

Third, Gatewood claims that he deserved a downward departure under U.S.S.G. § 5K2.0 because the government manipulated drug quantity, greatly overstating his criminal involvement. We find no impermissible manipulation. When told of the 114 kilograms of cocaine, Gatewood rushed to the Adam's Mark Hotel to prepare to steal it. He argues that he could not have transported or sold that much cocaine, but he told Ana Maria that he knew someone who could sell the cocaine for him and could have used the Suburban to transport the drugs.

Gatewood's final complaint about his sentence is that the district court mistakenly thought it lacked the authority to depart downward. The contention is not supported by the record.

VII.

Gatewood's last two arguments are that 1) the evidence was insufficient to support his convictions for conspiracy to possess cocaine with intent to distribute and use of a telephone to facilitate a drug offense, and 2) the evidence was insufficient to establish probable cause to arrest him, requiring suppression of his statements and evidence seized from his car. Both arguments attack Ana Maria's credibility and reassert the claim that Gatewood was only trying to earn reward money. We find that the evidence of the proposition to Montero, the statements to Ana Maria, the careful and repeated maneuvers by Musquiz, Garza, and Gatewood, and the many telephone calls to Ana Maria summed to probable cause and evidence sufficient to sustain the convictions.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN District of TEXAS

UNITED STATES OF AMERICA	**JUDGEMENT IN A CRIMINAL CASE** (For Offenses Committed On or After November 1, 1987)
V.	
ROBERT MARTINEZ GATEWOOD (Name of Defendant)	Case Number: H-92-00238-01 Rolland Bielstein Defendant's Attorney

THE DEFENDANT:
☐ pleaded guilty to court(s) _____
☒ was found guilty of count(s) 1 and 4 on April 20, 1993 _____ after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21, 841 (a)(1), (b)(1)(A) and 845	Conspiracy to possess with intent to distribute in excess of 5 kilograms of cocaine.	10-17-91	1
21,843(b)	Use of communication facility to commit a felony.	10-09-91	4

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☒ The Defendant has been found not guilty on count(s) 2 and 3 on April 20, 1993 and is discharged as to such count(s).

☐ Count(s) _____(is)(are) dismissed on the motion of the United States.

☒ It is ordered that the defendant shall pay a special assessment of $ 100, for count(s) 1 and 4, which shall be due ☒immediately ☐as follows: CLERK, UNITED STATES DISTRICT COURT, ATTENTION: Finance, P.O. Box 61010, Houston, Texas 77208.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. UNITED STATES ATTORNEY'S OFFICE, Financial Litigation Unit, P. O. Box 61129, Houston, Texas 77208.

Defendant's Soc. Sec. No.: 460-34-9172
Defendant's Date of Birth: June 11, 1950
Defendant's Mailing Address:
13502 Northborough Drive, No. 1203
Houston, Texas 77067

Defendant's Residence Address:
13502 Northborough Drive, No. 1203
Houston, Texas 77067

July 23, 1993
Date of Imposition of Sentence

/s/ Ewing Werlein, Jr.
Signature of Judicial Officer

EWING WERLEIN, JR.
UNITED STATES DISTRICT JUDGE
Name & Title of Judicial Officer

July 27, 1993
Date

Judgment-Page 2 of 4
Defendant: ROBERT MARTINEZ GATEWOOD
Case Number: H-92-00238-01

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of TWO HUNDRED NINETY-TWO (292) MONTHS on Count 1 and FORTY-EIGHT (48) MONTHS on Count 4 to run concurrently with each other.

☒ The court makes the following recommendations to the Bureau of Prisons: that the Bureau of Prisons consider placing the defendant in a facility within reasonable proximity to Houston due to the defendant's large supportive family.

☒ The defendant is remanded to the custody of the United States marshal.

☐ The defendant shall surrender to the United States marshal for this district.

- ☐ ___ a.m. / ___ p.m. on _____.
- ☐ as notified by the United States marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

- ☐ before 2 p.m. on _____.
- ☐ as notified by the United States marshal.
- ☐ as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ _____ at _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

Defendant: ROBERT MARTINEZ GATEWOOD
Case Number: H-92-00238-01

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of FIVE (5) YEARS on Count 1 and ONE (1) YEAR on Count 4, to run concurrently with each other.

While on supervised release, the defendant shall not commit another federal, state, of local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

☒ The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

☒ The defendant shall not possess a firearm or destructive device.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime, in addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notification and to confirm the defendant's compliance with such notification requirement.

Judgment-Page 4 of 4
Defendant: ROBERT MARTINEZ GATEWOOD
Case Number: H-92-00238-01

STATEMENT OF REASONS

☐ The court adopts the factual findings and guideline application in the presentence report.

OR

☒ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary): the Court ruled the conspiracy involved no more than 114 kilograms of cocaine that was reasonably foreseeable to the defendant in the jointly undertaken criminal activity. The Court based this ruling on the evidence presented at trial. The Court further ruled that the above ruling reduced the base offense level to 36 and the total offense level to 40, which established a guideline imprisonment range of 292 to 365 months.

Guideline Range Determined by the Court:

Total Offense Level: 40

Criminal History Category: I

Imprisonment Range: 292 to 365 months

Supervised Release Range: 5 to 5 years

Fine Range: $ 25,000 to $ 4,000,000

☒ Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $ N/A

☐ Full restitution is not ordered for the following reason(s):

☐ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

☒ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s): Given the fact that guideline range carries a severe punishment and the defendant has no previous criminal history, the Court feels that a sentence at the lower end of the guideline range is appropriate to achieve the sentencing objectives of punishment, deterrence and incapacitation.

OR

The sentence departs from the guideline range

☐ Upon motion of the government, as a result of defendant's substantial assistance.

☐ for the following reason(s):

APPROVED AS TO FORM: DMD

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-2600

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

GILBERT MARTINEZ and
ROBERT MARTINEZ GATEWOOD,
Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Texas

ON SUGGESTION FOR REHEARING EN BANC

(Opinion February 10, 1995, 5 Cir.,, F.3d)
(March 16, 1995)

Before POLITZ, Chief Judge, and HIGGINBOTHAM and DeMOSS, Circuit Judges.

PER CURIAM:

(X) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor Judge in regular active service of the Court having requested that

the Court be polled on rehearing en banc (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

( ) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The Court having been polled at the request of one of the members of the Court and a majority of the Judges who are in regular active service not having voted in favor (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/
United States Circuit Judge

CLERK'S NOTE

SEE FRAP AND LOCAL
RULES 41 FOR STAY
OF THE MANDATE.

APPENDIX D

PRESERVATION OF ERROR BELOW

The issue first arose below when the Government filed its Trial Brief of April 6, 1993, the sixth day of trial (R.3, Tab 77, p. 383). The brief was answered in writing on April 13, the ninth day of trial (R.2, Tab 85, p. 417). Thus, in miniature, the issue presented herein was framed for the Court below in writing by both sides.

Orally the issue first appears at T.10:156, oral argument ensues and the Court overrules the defense position. (T.10:165). Finally, during cross-examination objection was registered as the repugnant questions were actually propounded:

Q And knowing that you are out there, Mr. Musquiz, and you haven't done anything wrong, believing that everything is just fine and lawful and legal, when Officer Paonessa comes up and arrests you out at the scene and he's handcuffing you and searching you and patting you down, you don't say a word to him about what you were doing out there, do you?

MR. RAMSEY: Your Honor, I adopt and reurge the motion I have already made.

THE COURT: Overruled.

BY MR. STABE:

Q You may answer that.

A Oh. I don't remember if we talked or not. I don't --

Q Well, you just testified –

A I know that I was glad it was him.

Q You just testified to Mr. Ramsey you didn't say anything to him.[1]

A He may not have asked me anything.

Q Well, didn't you think it might have been kind of important, as officers are pointing guns at you and handcuffing you and taking you to a patrol car, to have said something like, "Hey, wait a minute. I'm out here with Bobby Gatewood. We are out here trying to help you guys"?

A I thought he was talking to them, he was explaining to them.

MR. RAMSEY: Pardon me, before you answer, sir.
Your Honor, may we reurge the objection I previously made at the bench to this entire series of –

THE COURT All right. Overruled.

MR. RAMSEY: Objection. I don't want to be in a position of waiver, Your Honor.

---

1 This question asserts an incorrect fact; defense counsel did not ask nor did Mr. Musquiz answer that he was silent, or "didn't say anything." In fact, the area was carefully avoided so as not to invite rejoinder or imply waiver.

BY MR. STABE:

Q Did you hear Robert Gatewood say anything to the officers?

A I don't know.

Q But, clearly, you never told the officers anything about what you were doing out there?

A Nobody asked me what I was doing out there.

Q You never volunteered that, did you?

A Nobody ever asked me anything.

Q The question is you never volunteered that information to them?

A No, sir.

T.11:90, line 21 through p. 92, line 11.

Supreme Court, U.S.
FILED
JUL 17 1995
CLERK

(2)

No. 94-1861

In the Supreme Court of the United States

OCTOBER TERM, 1995

GILBERT MARTINEZ MUSQUIZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

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Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

12 pp

QUESTION PRESENTED

Whether the government improperly cross-examined petitioner about his failure to provide his exculpatory explanation to the police at the time of his arrest, before he had been given *Miranda* warnings.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-1861

GILBERT MARTINEZ MUSQUIZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 45 F.3d 927.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 1995. A petition for rehearing was denied on March 16, 1995. Pet. App. 23a-24a. The petition for a writ of certiorari was filed on May 12, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C 846.[1] He was sentenced to 168 months' imprisonment, to be followed by a five-year term of supervised release. Gov't C.A. Br. 2.

1. Petitioner's cousin, Robert Gatewood, a police officer who had been suspended from the Houston, Texas, Police Department, formed a plan to steal cocaine and cash from drug dealers. Beginning in January 1991, Gatewood repeatedly asked a friend, Ana Maria Jaramillo, to find out from her imprisoned son the names of Colombian dealers. Gatewood explained to Jaramillo that he and his confederates could steal drugs and money by posing as police officers, and that the Colombians would be unable to report their losses to the police. Pet. App. 2a. After her arrest in October 1991, on unrelated charges, Jaramillo agreed to cooperate with the authorities in their investigation of Gatewood. *Id.* at 3a.

On October 9, 1991, Jaramillo told Gatewood that some Colombian dealers had bought 114 kilograms of cocaine, which they had stashed in their Chevrolet Suburban truck in the parking lot of a Houston hotel. Petitioner and Steve Garza, a former Houston police officer, drove to the hotel in Garza's car, and Gatewood drove there in his own car. Gatewood called

---

[1] Petitioner was acquitted on two counts of attempting to possess cocaine with intent to distribute it. His co-defendants, Robert Gatewood and Steven Garza, were convicted of conspiracy and use of a communication facility during the commission of a drug trafficking offense. Gov't C.A. Br. 2 n.1.

Jaramillo several times from his cellular phone, informing her "We're going to go after it." An undercover agent left the hotel, put a suitcase in the Suburban's trunk, drove it to a nearby shopping mall, put the keys inside the gas cap, and entered a nearby restaurant. Pet. App. 3a.

Petitioner, Garza, and Gatewood followed the Suburban to the mall. Petitioner got into Gatewood's car, and the two men pulled up alongside the Suburban. After almost two hours of surveillance, petitioner got out of Gatewood's car and walked around the Suburban, checking the tops of the tires and pulling on the door handles. Petitioner was wearing a police raid jacket and black leather gloves, and was carrying a security guard's badge, even though it was a hot day and he had never been a police officer or a security guard. Agents arrested petitioner and Gatewood, and found a loaded revolver under the driver's seat of Gatewood's car. Garza fled but turned himself in one week later. Pet. App. 3a-4a.

2. Petitioner testified at trial that he had never intended to steal cocaine from anyone; rather, his purpose in watching the Suburban had been to obtain information about a possible drug deal, which he would then provide to the DEA in return for a reward. Gov't C.A. Br. 17-18, 55. After the district court denied petitioner's motion *in limine*, the government cross-examined petitioner about his failure to volunteer that account of his activities at the time of his arrest, before his receipt of *Miranda* warnings. Pet. App. 4a; Gov't C.A. Br. 54-56.

3. The court of appeals affirmed the district court's decision to permit cross-examination of petitioner concerning his post-arrest, pre-warning silence. Pet. App. 1a-12a. The court understood this

Court's decisions in *Brecht* v. *Abrahamson*, 113 S. Ct. 1710, 1716 (1993), and *Fletcher* v. *Weir*, 455 U.S. 603, 605 (1982) (per curiam), to distinguish between the use of post-warning silence, which is both unfair and unreliable because of the *Miranda* warning's implicit assurance to a suspect that his silence will not be used against him, and the use of post-arrest, pre-warning silence, which "can be highly probative precisely because it implicates no such assurances." Pet. App. 6a. Turning to the facts of this case, the court found that "a reasonable juror may have supposed that [petitioner] would have explained when confronted by the police if he was in fact trying to assist the police in catching drug dealers," *ibid.*, and it concluded that the district court had acted "well within its discretion in allowing the cross-examination," *id.* at 6a-7a.

ARGUMENT

Petitioner contends (Pet. 4-9) that the Court should grant certiorari to resolve the permissibility of impeachment of a defendant's credibility with evidence of his post-arrest, pre-warning silence. Contrary to petitioner's contention, however, it is settled that a defendant's post-arrest, pre-warning silence can be highly probative, and that its use in impeachment violates no constitutional rights.

The Fifth Amendment guarantees an accused the right to remain silent during his criminal trial, and precludes the government from commenting on the silence of a defendant who asserts that right. *Griffin* v. *California*, 380 U.S. 609, 614 (1965). When the defendant takes the stand, however, "he does so as any other witness," *Raffel* v. *United States*, 271 U.S. 494, 496-497 (1926), and is "subject to cross-examination

impeaching his credibility just like any other witness," *Grunewald* v. *United States*, 353 U.S. 391, 420 (1957).

In *United States* v. *Hale*, 422 U.S. 171 (1975), this Court held, as a matter of federal evidentiary law, that the government may not impeach a defendant's credibility with evidence of his silence following his receipt of the warnings required by *Miranda* v. *Arizona*, 384 U.S. 436 (1966). Noting that persons who "had just been given the *Miranda* warnings" would be "particularly aware of [their] right to remain silent," the Court found that the "failure to offer an explanation during the custodial interrogation can as easily be taken to indicate reliance on the right to remain silent as to support an inference that the explanatory testimony was a later fabrication." *Hale*, 422 U.S. at 177. For that reason, the Court held that the defendant's silence was not "sufficiently probative of an inconsistency with his in-court testimony" to justify its admission into evidence. *Id.* at 180. The following year, in *Doyle* v. *Ohio*, 426 U.S. 610, 618 (1976), the Court held that because *Miranda* warnings implicitly assure the defendant "that silence will carry no penalty, * * * it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial."[2]

---

[2] See also *Doyle*, 426 U.S. at 619 ("[I]t does not comport with due process to permit the prosecution during the trial to call attention to [the defendant's] silence at the time of arrest and to insist that because he did not speak about the facts of the case at that time, as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial testimony.") (quoting *Hale*, 422 U.S. at 182-183 (White, J., concurring in the judgment)).

Since *Hale* and *Doyle*, the Court has made clear that the government may impeach a defendant's credibility with his failure to speak before his receipt of *Miranda* warnings. The Court has explained that the unfairness of using a defendant's silence results from the prior administration of *Miranda* warnings. That unfairness is absent when the government uses or comments on a defendant's failure to give his exculpatory account before his receipt of *Miranda* warnings. See *Jenkins* v. *Anderson*, 447 U.S. 231, 235-241 (1980); see also *Fletcher* v. *Weir*, 455 U.S. 603, 606 (1982) (per curiam) ("[W]e have consistently explained *Doyle* as a case where the government had induced silence by implicitly assuring the defendant that his silence would not be used against him."); *Wainwright* v. *Greenfield*, 474 U.S. 284, 291 (1986) ("[B]reaching the implied assurance of the *Miranda* warnings is an affront to the fundamental fairness that the Due Process Clause requires.").[3] At the same time, the Court has noted that, because it is the administration of the *Miranda* warnings that renders a suspect's

---

[3] Contrary to petitioner's argument, Pet. 9-10, there is no confusion among the lower courts on the constitutional permissibility of impeachment through use of a defendant's post-arrest, pre-warning silence. In *United States* v. *Baker*, 999 F.2d 412, 415 (1993), and *United States* v. *Negrete-Gonzales*, 966 F.2d 1277, 1281 (1992), the Ninth Circuit recognized that the government may use pre-warning silence, but held that the government may not conflate the defendant's silence in pre-warning and post-warning contexts by referring broadly to the defendant's post-arrest silence. In *United States* v. *Canterbury*, 985 F.2d 483, 486 (10th Cir. 1993), the court merely applied *Doyle*, holding that the government's use of the defendant's post-warning silence violated his right to due process.

ensuing silence "insolubly ambiguous" (*Doyle*, 426 U.S. at 617), the failure to speak upon arrest before administration of such warnings—like the failure to deny any other accusation—may well be probative. *Brecht* v. *Abrahamson*, 113 S. Ct. 1710, 1716-1717 (1993).[4]

In this case, the district court correctly found that petitioner's failure to claim an innocent intent at the time of his arrest was probative of whether his trial defense had been recently fabricated. As the court of appeals noted, "a reasonable juror may have supposed that [petitioner] would have explained when confronted by the police if he was in fact trying to assist the police in catching drug dealers." Pet. App. 6a. See *Brecht*, 113 S. Ct. at 1716 ("Such silence is probative and does not rest on any implied assurance by law enforcement authorities that it will carry no penalty."); cf. *id.* at 1716-1717.[5]

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[4] That *Brecht* was a state case that came to the Court on collateral review had no bearing on the Court's determination that the defendant's pre-warning silence was probative.

[5] Petitioner's claim that the decision in this case conflicts with the Fifth Circuit's earlier decisions in *United States* v. *Impson*, 531 F.2d 274 (1976), and *United States* v. *Henderson*, 565 F.2d 900 (1978), merits no further review. This Court does not grant certiorari to resolve intra-circuit conflicts. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). Moreover, as the court of appeals explained (Pet. App. 5a), *Henderson* and *Impson* "reflect hostility toward prosecutorial use of a defendant's silence" that "flourished against the backdrop of an expansive vision of a defendant's rights under the Fifth Amendment." That view has been eclipsed by the Court's later acknowledgement that the government may, consistent with due process, impeach a defendant with his post-arrest, pre-warning silence, and such

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

DEBORAH WATSON
Attorney

JULY 1995

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silence can be highly probative. See *Brecht*, 113 S. Ct. at 1716-1717.